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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1668

CLIFTON BYRD, et al.,

Petitioners,

versus

CITY OF SAN ANTONIO, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The City of San Antonio, Texas (San Antonio) and the other named Respondents oppose the Petition for Writ of Certiorari filed herein by Clifton Byrd, et al., and request this honorable Court to deny certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reported at 587 F.2d 184, on grounds that that court's decision is correct as a matter of federal law and that Petitioners present only nonjusticiable political issues and raise claims based only on state law which are without merit.

QUESTIONS PRESENTED

The Fifth Circuit Court of Appeals has determined no significant precedent-setting issues but has merely disposed of Petitioners' claims on the basis of well-settled federal principles.[1] One essential question, which was correctly decided by the Court of Appeals is presented in this case:

1. Whether the City Public Service Board of San Antonio is a "form of government" subject to the Guaranty provisions of Article IV, Section 4 of the United States Constitution and to the voting protections of federal statutes.

Related questions presented which the court below correctly recognized as dispositive of Petitioners' claims are the following:

2. Whether Petitioners' Guaranty Clause claims present a justiciable issue.

3. Whether Petitioners' claims questioning the San Antonio City Council's authority initially to prescribe the City Public Service Board's method of filling trustee vacancies raise only questions of state law.

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1 The facts of this case, as well as the controlling issues and legal principles, are as set forth in the opinion of the Fifth Circuit, Pet. 5a-10a.

REASONS WHY THE WRIT SHOULD BE DENIED:

I. The Fifth Circuit correctly determined that the City Public Service Board is a proprietary and nongovernmental body which is not subject to the standards of republicanism and voting rights under federal constitutional and statutory law.

Like other municipal corporations, the City of San Antonio exercises a wide variety of functions, ranging from legislative exercise of the state's police power to nongovernmental administrative and proprietary activities which partake of no legislative discretion. The city's traditional legislative powers are exercised only by the city's one governing body, the San Antonio City Council. This is true of the governmental powers whose exercise affects the city's municipally owned gas and electric systems: *only* the San Antonio City Council has the authority, pursuant to state statute, to levy and collect taxes [Art. 1175, Vernon's Texas Civil Statutes], review and set rates and charges for electric and gas service [Art. 1123], issue bonds for system improvements and extensions on whatever terms the council may choose [Art. 1111b], sell real property or improvements of the electric and gas systems [Art. 1175], control and disburse the "profits" of utility operations up to 14 percent of gross revenues for whatever general municipal purpose the council chooses [Art. 1113a], and, as determined by the Texas

Supreme Court's interpretation of Art. 1109b in *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975), exercise the power of eminent domain.

The boards of trustees through which cities are authorized under Article 1115, Vernon's Texas Civil Statutes, to operate their municipally owned electric and gas systems are neither vested with nor exercise any of these powers, and have no authority to exercise the general police power of the State for any purposes. The board, which Petitioners admit has no capacity to sue or be sued in its own name (Pet. 8), has the limited function of managing and operating the electric and gas systems, as a proprietary function of the city. See *San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262 (Tex. 1977). Proprietary boards established pursuant to Article 1115 — notwithstanding that they are within the generic classification of "municipal corporations" for purposes of state and federal statutes as an agency of the City, consistent with the results reached in *Alaniz v. City of San Antonio*, 80 L.R.R.M. 2983 (1971) and *City Public Service Board of San Antonio and Association de Obreros Mexico-Americanos*, 197 N.L.R.B. 312 (1972) — have never been deemed to be "governing bodies" in the legislative sense under state law, much less for purposes of federal statutory and constitutional law. See *Garza v. City of Robstown*, 483 S.W.2d 32 (Tex.Civ.App. — Corpus Christi 1972, no writ); *Burch v. City of San Antonio*, supra.

The City Public Service Board thus exercises none of the traditional governmental functions to which this Court has applied the principles of "one man-one vote." As stated by the Fifth Circuit in this case:

> There is no statute or constitutional provision which requires election — or appointment by elected officials — of the persons who carry out this proprietary and non-governmental function. The [Petitioners] cite neither judicial nor statutory law which would hold that the officers in question are legislative officers under the appropriate federal standards, or that their selection by the methods [Petitioners] urge would be required as a matter of law. 587 F.2d at 186; Pet. 9a.

This Court has refused to extend 14th Amendment voting standards to elections in special purpose districts which had "relatively limited authority," even though they exercise some typical governmental powers which as a matter of law the City Public Service Board lacks. *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 35 L.Ed.2d 659 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743, 35 L.Ed.2d 675 (1973). Moreover, the Court has made clear that the *appointment* of non-legislative state or local officers not subject to election, such as the trustees here, is a matter of state discretion. *Sailors v. Board of Education of the County of Kent*, 387 U.S.

105, 18 L.Ed.2d 650 (1967).[2] The Court reaffirmed that right of flexibility in municipal arrangements in both *Avery v. Midland County*, 390 U.S. 474, 485, 20 L.Ed.2d 45, 53-54, (1968), and *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 58-59, 25 L.Ed.2d 45, 52, (1970).[3]

Petitioners cannot bridge the chasm between the class of entities to which this Court applies voting standards and the undisputable facts that the City Public Service Board is appointed, not elected, and has only limited proprietary functions. Instead, they seek to have this Court extend voting right principles far beyond the boundaries established by the Court's prior decisions.

II. Petitioners' Guaranty Clause claims and 14th Amendment claims raise nonjusticiable political questions.

Even if Petitioners' claims of constitutional deprivation were leveled at a federally cognizable "form of

2 The City Public Service Board is an appointive board, contrary to Petitioners' contention. The office of Mayor of San Antonio has been subject to popular election only since 1975, being selected in previous years by members of the City Council from among their number, and the mayor sits as a trustee of the board on an ex officio basis.

3 See also, *Rosenthal v. Board of Education*, 385 F.Supp. 223 (E.D. N.Y. 1974), *aff'd.* 420 U.S. 985, 43 L.Ed.2d 667 (1975). This principle has been consistently applied by lower federal courts. *E.g., Egan v. Wisconsin State Board*, 332 F.Supp. 964 (E.D. Wis. 1971); *Oaks v. Board of Trustees*, 385 F.Supp. 392 (N.D. Miss. 1974); *Benner v. Oswald*, 444 F.Supp. 545 (M.D. Pa. 1978); *Burton v. Whittier Vocational Regional School District*, 449 F.Supp. 37 (D. Mass. 1978), *aff'd.* 587 F.2d 66 (1st Cir. 1978).

government," which the City Public Service Board of San Antonio patently is not, their invocation of Article IV, Section 4 of the federal Constitution presents only a political question. This Court's decisions have established that Guaranty Clause claims are not appropriate for judicial determination. *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118, 56 L.Ed. 377 (1912); *O'Neill v. Leamer*, 239 U.S. 244, 60 L.Ed. 249 (1915); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 81 L.Ed. 835 (1937).

More significantly, this Court made clear in *Baker v. Carr*, 369 U.S. 186, 7 L.Ed.2d 663, 691 (1962) that a Fourteenth Amendment claim may itself be "so inmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself." This is just such a case. Petitioners have failed to show the applicability of any of the standards this Court has used to test for deprivation of constitutional voting rights. Their failure to address these standards makes clear that Petitioners' Equal Protection claims are invoked solely in aid of their contention that the trustee selection method for a proprietary and nonlegislative appointed board is invalid as "non-republican." Petitioners' entire cause of action seeks the resolution of a political question and does not warrant this Court's consideration.

III. Petitioners' contentions that the selection method for the City Public Service Board fails to comply with the directives of Article 1115, Vernon's Texas Civil Statutes, presents no federal question for determination by this Court.

The City Council ordinances and bond indenture provision establishing the trustee selection method attacked by Petitioners are based on the authority of Article 1115, Vernon's Texas Civil Statutes, which provides:

> The terms of office of such board of trustees, their powers and duties, the manner of exercising same, the election of their successors, and all matters pertaining to their organization and duties may be specified in such contract of encumbrance.

Petitioners' assertions under their final point that the existing selection method for the trustees is not authorized by this statute are defeated by the very Texas cases they cite, which have established the validity of the trustees' status under Texas law. *Guadalupe-Blanco River Authority v. Tuttle*, 171 S.W.2d 520 (Tex.Civ.App. — San Antonio) *aff'd.* 141 Tex. 523, 174 S.W.2d 589 (1943); *see San Antonio Independent School District v. City of San Antonio*, 550 S.W.2d 262 (Tex. 1977); *Morris v. City of San Antonio*, 572 S.W.2d 831 (Tex.Civ.App. — Austin 1978, no writ); *San Antonio Independent School District v. Board of*

Trustees of the San Antonio Electric & Gas System, 204 S.W.2d 22 (Tex.Civ.App. — El Paso 1947, writ ref'd). Since Petitioners have failed to state an actionable or substantial claim under the federal laws or Constitution, these pendent state claims of Petitioners are not properly before the Court.

CONCLUSION

Based upon the pleadings and undisputed facts, Petitioners have wholly failed, as a matter of law, to allege a cause of action that they have been wrongfully deprived of any constitutional or federal statutory rights. This Court's holdings have made plain that the standards of equal voting rights are not to be applied to nonlegislative, non-elected municipal entities such as the City Public Service Board. The line thus drawn by the Court has the practical effect of leaving to state and local discretion the selection method for a multitude of municipal functionaries whose powers and responsibilities are nongovernmental. Petitioners' claims raise only political issues and are otherwise devoid of substance. For the reasons shown, the Petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of June, 1979, three copies of Respondents' Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were mailed, postage prepaid, to Craig L. Austin, Esq., Suite 727, 711 Navarro, San Antonio, Texas, 78205, counsel for the Petitioners. I further certify that all parties required to be served have been served.

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